United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

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UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

Docket No. 75-1018

UNITED STATES OF AMERICA,

Appellee,

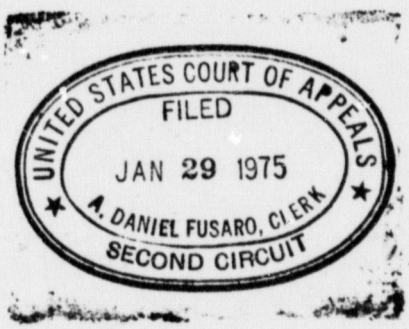
-against-

PETER M. BEKENY,

Defendant-Appellant.

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANT'S BRIEF



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UNITED STATES COURT OF APPEALS
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BRIEF FOR THE DEFENDANT-APPELLANT
PETER M. BEKENY

Preliminary Statement

The Appeal is taken from a denial on November 20, 1974 of a motion filed in the United States District Court for the Southern District of New York on February 6, 1974. Peter M. Bekeny moved (under the provisions of §2255 of Title 28, U.S.C. and Rule 33 of the Federal Rules of Criminal Procedure) to set aside a judgement of conviction which had been entered on October 11, 1973. The motion presented a claim that Peter M. Bekeny had been denied the effective assistance of counsel at a trial which ended with his conviction in violation of his rights under the Sixth Amendment to the United States Constitution. The motion was denied by Judge Lee P. Gagliardi without hearing or findings of fact in a memorandum opinion dated November 20, 1974. The notice of appeal was filed by Peter M. Bekeny on November 29, 1974.

Issues Presented

1. Has Peter Bekeny been afforded his rights to the effective assistance of counsel by the mere appointment of counsel and counsel's attendance at the trial, or does that right also entail assistance in preparation for trial and in compelling the attendance of witnesses at the trial?

2. On a petition under §2255 of Title 28, U.S.C., is Peter Bekeny entitled to a hearing and chance to present evidence where his petition alleges, without contradiction, that his assigned counsel did not confer with him in advance of the trial, did not interview or subpoena the witnesses for the accused, did not obtain the files and records of the accused in the hands of predecessor counsel?

Related Proceedings

An indictment filed on March 2, 1971 charged the Appellant, Peter M. Bekeny, with violations of the mail fraud provisions of Title 18, U.S.C. §1341, and perjury before the Grand Jury investigating into his activities in violation of Title 18, U.S.C. §1623. On June 18, 1973 the District Court appointed John C. Corbett, Esq. as counsel for Peter M. Bekeny and on June 21, 1973 the trial of Bekeny and his co-defendants, Kenneth Glassman and American Business Industries International, Inc. was commenced before Judge Lee P. Gagliardi and a jury. After eight days of trial, the jury returned a verdict of guilty against Bekeny on

eight of the mail fraud counts and four of the perjury counts in the indictment. On October 11, 1973, Bekeny was sentenced by the Court to concurrent terms of eighteen months imprisonment upon each of the counts to which he had been found guilty.

A direct appeal from the conviction was taken on October 11, 1973. Motions to relieve assigned counsel and to appoint substitute counsel were denied by this Court on November 19, 1973. The appeal was briefed and argued by John C. Corbett, Esq. The conviction was affirmed, without opinion, by this Court on February 13, 1974. A petition for a writ of certiorari to the Supreme Court was then filed by John C. Corbett, Esq. Bekeny then wrote to the Supreme Court asking that this petition be withdrawn. Upon the formal application of assigned counsel, the petition was dismissed on April 29, 1974.

On March 18, 1974, Peter M. Bekeny appeared in the United States District Court for the Southern District of New York before Judge Constance B. Motley for the purposes of surrender. An oral motion was made allowing Bekeny to remain on bail pending the determination of the motion under §2255. The motion for a stay was denied by Judge Motley and the following order endorsed upon the motion papers:

> "Motion for stay of surrender or bail pending disposition of motion under 28 U.S.C. §2255 denied for reasons set forth on record. The §2255 application will be heard and determined after case returned to this Court from Supreme Court."

Peter M. Bekeny surrendered and commenced service of his sentence on March 18, 1974. He was thereafter confined at the Federal Correctional Institution, Danbury, Connecticut. After the service of approximately nine months, he was released upon parole on December 24, 1974 and is on parole as of the date of this brief.

Statement of the Case

The issues before the Court concern the adequacy of the representation by assigned counsel in preparation for and during a criminal trial conducted in the District Court from June 21 to July 2, 1973. The trial occupied eight full days. The Government's case included thirty-four (34) witnesses, one hundred eighty-four (184) exhibits. The transcript runs to one thousand one hundred eighty-seven (1,187) pages. The defense presented by assigned counsel was described in the Government's brief on direct appeal as follows:

> "THE DEFENDANT BEKENY'S CASE
>
> Bekeny called two character witnesses, one of whom was unqualified to testify and one of whom had not heard of Bekeny's reputation in the community where he worked. (Tr. 998-1003)." Brief filed by the U.S. Attorney, January 25, 1974, page 11."

At the trial, Bekeny was represented by John C. Corbett, Esq., counsel assigned for his defense on June 18, 1973 for a trial commenced on June 21, 1973. The moving affidavit of Peter M. Bekeny states (1) that at no time before the commencement of the trial did he have the chance to confer with his counsel, (2) that counsel failed to obtain the documents and records gathered by his previous counsel, Edmund Rosner, in preparation for the trial, (3) that assigned counsel conducted no investigation, interviewed no witnesses, (4) that counsel conducted no depositions of his witnesses nor did he make a realistic effort to bring to Court any of the twenty-two witnesses whom Bekeny desired to have testify. The motion papers make out a case of lack of preparedness for the trial.

Peter M. Bekeny is a refugee from the Hungarian communist regime. Although he speaks some English but his comprehension of the language is incomplete. When testifying before the Grand Jury, a Yugoslavian interpreter was used.

The activities which gave rise to the indictment involved recruitment of "distributors" for the sale outside the United States of investments in American oil businesses. The investments were to be "royalty acres" and "limited partnerships." These are forms of investment in the development and production of oil in the United States. The indictment charged that fraud was committed in attracting prospective distributors and in securing cash deposits from them.

Bekeny was arraigned upon the indictment on April 14, 1971. At the arraignment, Bekeny was represented by Julien Denenberg, who also represented the corporate defendant, American Business Industries International, Inc. Mr. Denenberg applied on October 11, 1972 for leave to resign as counsel for both Bekeny and the Corporate defendant. That motion was denied by the District Court on February 13, 1973. Mr. Denenberg did conduct the defense of the corporate defendant at the trial.

Upon the recommendation of the Bar Association of the City of New York, Bekeny retained Edmund Rosner as his defense counsel on September 17, 1971. Although Mr. Rosner did not file a formal notice of appearance, he did conduct some pre-trial proceedings. Unknown to Bekeny, Edmund Rosner had been indicted in the United States District Court for the Southern District of New York in December of 1970. That indictment was dismissed in January, 1972 and a second indictment filed in July, 1972. Rosner was conficted after trial under the second indictment on December 5, 1972 (See Docket No. 73-1511 of this Court). For obvious reasons, Edmund Rosner was not able to represent Bekeny while on trial or thereafter.

Bekeny was then given additional recommendations by the Bar Association, among them that of John C. Corbett. In December, 1972, Mr. Corbett was asked to represent Bekeny. However, by letter dated January 15, 1973, Mr. Corbett refused. These facts were communicated to the Court by Bekeny appearing without counsel at the December, 1972 and January, 1973 calls of the case.

A conference was held before Judge Lee P. Gagliardi on May 31, 1973. The defendant Bekeny was not present and was unaware of the hearing until after the trial. Mr. Corbett attended, indicated to the Court that he would, if appointed by the Court, undertake to represent Bekeny. Two statements of Mr. Corbett in the record of the May 31st hearing provide a clear indication that Mr. Corbett was not then prepared for the case and would be otherwise occupied for the next few weeks.

> "Mr. Corbett: ... I am starting a trial ... we are starting on the 11th before Judge Wienstein. I expect two weeks will be the most for that, although we do have a whole ship's crew there..." (Tr. 11)

* * * * * * *

> "Mr. Corbett: Mr. Nields (prosecuting attorney), will you be able to give me a copy of the indictment? Most of Mr. Bekeny's things are in Mr. Rosner's hands." (Tr. 13)

Bekeny's affidavit in support of the motion in the Court below states that he, Bekeny, did go to Corbett's office on June 15th to sign the papers necessary for the Court assignment of counsel but that he was unable to confer with Mr. Corbett concerning the case.

Bekeny's affidavit states:

> "6. ... However, no conference was ever held between deponent and Mr. Corbett in advance of the trial on June 21 to July 2, 1973."

"7. As mentioned previously, deponent had turned over to Edmund Rosner records and documents relevant to the defense in anticipation that Mr. Rosner would represent deponent at the trial. Mr. Rosner had also developed some information on the basis of his discovery motion. Mr. Corbett apparently never obtained these papers nor made any effort to read them. At page 13, lines 12-14 of the minutes of the hearing held on May 31, 1973 before the Honorable Lee P. Gagliardi, Mr. Corbett states:

> "Mr. Corbett: Mr. Nields, will you be able to give me a copy of the indictment? Most of Mr. Bekeny's things are in Mr. Rosner's hands."

In a post-trial affidavit dated July 31, 1973 submitted in conjunction with a motion for leave to re-argue, he (Corbett) states the following:

> "The trial of this defendant was first scheduled for October 10, 1972 then adjourned to November 20, 1972 and then to December 4, 1972. Following these adjournments, the case was set down for January 30, 1973. These dates have been furnished to your deponent by the defendant, Peter M. Bekeny, because of the fact that the indictment of Rosner has made his files unavailable."

"8. To the best of deponent's knowledge, Mr. Corbett did not attempt to interview a single witness or potential witness in advance of the trial or in advance of their giving testimony at the trial. Deponent prepared a list of approximately 22 witnesses which he desired to have testify at the trial. Nothing was done to make this testimony available to the Court until the recess at the end of the day on June 27, 1973. (Transcript pages 681 and 755).

At that time Mr. Corbett wrote out by hand three subpoenas directed to the Reverend Dean Andrew Harsany, of Carteret, New Jersey; Joachim Prinz of Hamburg, Germany; and Doctor Laszlo Varga of New York City. Mr. Corbett told deponent to serve the subpoenas himself..."

> "13. The indictment charged deponent and his co-defendants with mail fraud. The Government's case relied upon the ultimate failure of the sales venture as proof to the jury of the initial intent of the defendants. Deponent had a defense. Deponent invested and lost his own money. The corporation spent money in setting up the venture, incorporation in Germany, printing, market research, office space, transportation and living expenses for "distributors". These facts could have been established by competent witnesses for the defense but were not."

It involves no argument to state that the three subpoenas issued on Wednesday, June 27th for appearance on Monday, July 2nd were mere window dressing. Counsel is presumed to know that a party is disqualified as a process server. That delivery of the subpoena by any means to a German citizen in Germany would be ineffectual.

Argument

1. THE CONSTITUTIONAL RIGHT OF AN ACCUSED TO THE ASSISTANCE OF COUNSEL FOR HIS DEFENSE IS ONE OF SUBSTANCE NOT SATISFIED BY PRO FORMA ASSIGNMENT OF AN ATTORNEY FOR PURPOSES OF TRIAL

The right of an accused to the assistance of counsel for the conduct of his defense is fundamental within our system of justice. It is basic to our sense of fairness, to the guarantee to the accused of a fair trial. It is a fundamental right guaranteed under the Sixth and Fourteenth Amendments to the Constitution. Such a fundamental right is not satisified by the mere assignment of counsel for the conduct of the trial. The accused is entitled to effective assistance in preparation as well as in the conduct of the trial itself.

> "We hold that denial of opportunity to consult with counsel on any material step after indictment or similar charge and arraignment violates the Fourteenth Amendment." Hawk v. Olson, 326 U.S. 271, 278, 90 L.Ed. 61, 67 (1945)"

> "But the constitutional requirement of representation as trial is one of substance, not of form. It could not be satisfied by a pro forma or token appearance. Appellant was entitled to 'effective aid in preparation and trial of the case.'" Brubaker v. Dickson, 310 F.2d 30, 37 (9th Cir., 1962), cert. den. 372 U.S. 978."

Because the standard of effective assistance requires more than a pro forma appearance, the rights of the accused, Peter M. Bekeny, are not to be measured solely by the presence of counsel at the trial. He was and is entitled to the assistance of counsel in preparing for trial. On this issue the papers submitted by Bekeny in support of his motion for relief under §2255 was explicit and without material contradiction in the affidavit of the Government or in the affidavit of John C. Corbett.

11. THE ADEQUACY OF COUNSEL'S PREPARATION IS A CONSTITUTIONAL ISSUE ON WHICH EVIDENCE DEHORS THE TRIAL RECORD IS REQUIRED

The absence of adequate preparation on the part of defense counsel may not be apparent to the Court and jury. For this is an error of omission. The trial record will rarely show the failure of counsel to investigate, to interview, to subpoena.

For that very reason the Court is not limited to the trial record upon a motion under §2255 which places in issue the adequacy of legal representation.

> "Much of the evidence of counsel's ineffectiveness is frequently not reflected in the trial record (e.g., a failure to investigate the case, or to interview the defendant or a witness before trial). As a result, ineffectiveness cases have often evolved into tests of whether appellate judges can hypothesize a rational explanation for the apparent errors in the conduct of trial. But neither one judge's surmise nor another's doubt can take the place of proof. Thus, when a claim of ineffective assistance is contemplated, it should first be presented to the district court in a motion for a new trial. In such a proceeding evidence dehors the record may be submitted by affidavit and when necessary, the district judge may order a hearing or otherwise allow counsel to respond." United States v. DeCosta, 487 F.2d 1197, 1204-5, (D.C.Cir., 1973)

A similar point of view appears in the opinion of the Third Circuit, sitting en banc in Moore v. United States, 432 F.2d 730, 739 (1970):

> "We have no doubt that counsel acted in an effective manner as far as the trial judge was able to observe his conduct. But representation involves more than court-room conduct of the advocate. The exercise of the utmost skill during the trial is not enough if counsel has neglected the necessary investigation and preparation of the case or failed to interview essential witnesses or to arrange for their attendance. Such omissions, of course, will rarely be visible on the surface of the trial and to that extent the impression of a trial judge regarding the skill and ability of counsel will be incomplete."

> "In the light of petitioner's claim of inadequacy of the preparation for trial as well as of counsel's performance at the trial itself and the seeming confirmation of some of these claims which the record presents, we believe it is not possible to say, as §2255 requires, that the files conclusively demonstrate that the claims are so unfounded that they may be rejected without an evidentiary hearing."

III. BEKENY SHOULD HAVE BEEN GRANTED AN EVIDENTIARY HEARING UPON HIS MOTION, HAVING PRESENTED A PRIMA FACILE CASE FOR SETTING ASIDE THE JUDGMENT.

The motion presented by Bekeny clearly presents a case of inadequate representation under the earlier standard of this Circuit United States v. Wight, 176 F.2d 376, 379 (2nd Cir., 1949) or of the more recent standard of the District of Columbia, United States v. DeCosta, 487 F.2d 1197, 1203-4 (1973). The more specific statement to be found in this latter opinion is that defense counsel (1) should confer with his client without delay and as often as necessary to elicit matters of defense; (2) should advise his client of his rights; (3) must conduct appropriate investigations, both factual and legal in preparation of the defense.

> "If a defendant shows a substantial violation of any of these requirements, he has been denied effective representation unless the government, 'on which is cast the burden of proof once a violation of these precepts is shown, can establish lack of prejudice thereby.' Coles v. Peyton, 389 F.2d 224, 226 (4th Cir. 1968). Two factors justify this requirement. First, in our constitutionally prescribed adversary system, the burden is on the government to prove guilt. A requirement that the defendant show prejudice, on the other hand, shifts the burden to him and makes him establish the likelihood of his

> innocence. It is no answer to say that the appellant has already had a trial in which the government was put to its proof because the heart of his complaint is that the absence of the effective assistance of counsel has deprived him of a full adversary trial.
>
> "Second, proof of prejudice may well be absent from the record precisely because counsel has been ineffective. For example, when counsel fails to conduct an investigation, the record may not indicate which witnesses he could have called, or defense he could have raised." 487 F.2d 1197, 1204.

IV. DEFENDANT BEKENY WAS UNDUELY PREJUDICED BY THE EXCESSIVE TIME TAKEN BY THE COURT FOR RENDERING ITS DECISION. TO AVOID FURTHER HARDSHIP UPON THE DEFENDANT, THIS COURT SHOULD DIRECT REVERSAL OF THE CONVICTION AND DISMISSAL OF THE INDICTMENT.

The defendant Bekeny filed his motion under §2255 of Title 28 U.S.C. on the 6th of February, 1974. Despite the statutory directive for a prompt determination, a decision was not forthcoming in the District Court until the 20th of November, 1974. In the meantime, the defendant was compelled to serve his sentence. By inaction,the District Court barred Bekeny from resort to his Constitutional rights. The Court's sentence was served while the Court held under advisement the motion to set aside the conviction upon which it was based.

The fact that the major portion of Bekeny's sentence has been served, and he is now on parole, does not render moot the motion which he has made. Other substantial rights of Bekeny's remain dependent upon the outcome of this Appeal. Nevertheless, it would be unjust to this Appellant to direct a retrial. It is now nearly four years from the original indictment, the Appellant has served out the major portion of his sentence. This Court is requested, as it is authorized to do under the provisions of §2255 of Title 28, U.S.C., to dismiss the indictment with prejudice.

Conclusion

It is respectfully requested on behalf of the Appellant, Peter M. Bekeny, that the judgment of conviction against him be set aside for reasons of a lack of effective assistance of counsel at his trial and, in the interest of justice and fairness, that the indictment be dismissed.

Respectfully submitted,

Arthur M. Boal, Jr.
Assigned Counsel for
Peter M. Bekeny

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

Marleine Lamey, being duly sworn, deposes and says: deponent is not a party to the action, is over 18 years of age and resides at 7203 Royce Place, Brooklyn, New York. On January 29, 1975 deponent served the within Brief upon Honorable Paul Curran, United States Attorney, Southern District of New York, Foley Square, New York, the address designated by said attorney for that purpose by depositing a true copy of same enclosed in a post-paid properly addressed wrapper in official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Marleine Lamey

Marleine Lamey

Sworn to before me this
29 day of January, 1975

Notary Public

JOSEPH E. DOTI
Notary Public, State of New York
No. 52-6082901
Qualified in Suffolk County
Commission Expires March 30, 1976